IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 20TH APRIL 2007 / 30TH CHAITHRA 1929

WP(C).No. 33588 of 2006(W)

PETITIONERS:

1.T.P.MOOSAKUTTY, S/O. MOHAMMED,
AGED 43 YEARS, THOTTAKKARA PALLIYALIL HOUSE,
KOLAMANGALAM, VALANCHERRY P.O.,
MALAPPURAM DISTRICT.

2.T.P.MOIDEENKUTTY, S/O. MOHAMMED,
AGED 38 YEARS, THOTTAKKARA PALLIYALIL HOUSE,
KOLAMANGALAM, VALANCHERRY P.O.,
MALAPPURAM DISTRICT.

BY ADV. SRI.K.GOPALAKRISHNA KURUP

RESPONDENTS:

1.VALANCHERRY GRAMA PANCHAYATH,
REP. BY IT'S SECRETARY, VALANCHERRY P.O.,
MALAPPURAM DISTRICT.

2.THE SECRETARY,
VALANCHERRY GRAMA PANCHAYATH.

*ADDL.R3.K.B.ABBAS, S/O.MOHAMMED, KARAPARAMBIL,
VALANCHERRY.

**ADDL.R4.GOVERNMENT OF KERALA, REPRESENTED BY THE
SECRETARY, LOCAL SELF GOVERNMENT DEPARTMENT.

*ADDL.R3 IS IMPLEADED AS PER THE ORDER DATED 20.4.2007
IN I.A.NO.481/07.

**ADDL.R4 IS IMPLEADED SUO MOTU AS PER THE ORDER DATED
20.4.2007 IN THE WRIT PETITION.

R1-R2 BY ADV. SRI.K.S.BABU
SMT.N.SUDHA
R3 BY ADV.SRI.BABU PAUL
R4 BY GOVT. PLEADER MR.K.J.MOHAMMED ANSAR

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 20/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE,J.

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W.P.(C)No.33588 of 2006

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Dated: 20th April, 2007

JUDGMENT

The grievance of the petitioners whose proposal to make land available to the 1st respondent-Panchayat for the construction of a bus stand and to construct bus stand buildings free of cost was accepted by the Panchayat is that the Panchayat is not executing the necessary agreements permitting them to commence the construction works.

2. The Valancherry Grama Panchayatl and its Secretary are the respondents. Pursuant to a decision taken by the 1st respondent-Panchayat on 23.11.2004 applications were invited from persons who were prepared offer lands suitable for construction of a bus stand for the Panchayat. The petitioners submitted a plan and project for the construction of the bus stand wherein it was proposed that necessary land will be given free of cost and that bus stand building will be constructed free of cost satisfying all the requirements of the Panchayat. Similar proposals were submitted by others also. Finally the petitioners' proposal was accepted by the Panchayat. The decision of the Panchayat was unsuccessfully challenged before the Tribunal for Local Self Government Institutions. The Tribunal's order was challenged by certain persons before this court in

W.P.C.Nos.22971/05 and 23098/05. This court dismissed the Writ Petitions repelling the challenge against acceptance of the proposal submitted by the petitioners. However this court modified the decision of the Panchayat to the extent of clarifying that the Panchayat shall not enter into any contract with the petitioners herein till the matter engaged the attention of the Regional Transport Authority and sanction is obtained. This court clarified further that no construction of any sort can be done on the basis of the decision of the Panchayat nor any other activity carried out under that decision except after sanction is obtained from the Regional Transport Authority. The judgment of this court was appealed against. The Writ Appeal was dismissed by a Division Bench and Ext.P1 is copy of the judgment in the Writ Appeal. Pursuant to this court's judgment the Panchayat moved the R.T.A.Malappuram and the R.T.A.Malappuram by Ext.P2 proceedings dated 23.9.2006 accorded sanction for the construction of proposed new bus stand. Thereafter the petitioners submitted Ext.P3 request dated 30.10.2006 before the 2nd respondent to take steps for execution of the necessary agreement between the petitioners and the Panchayat. Ext.P3 request was followed by Ext.P4 representation dated 15.11.2006. Along with Ext.P4 a copy of the draft agreement proposed by the petitioners, i.e. Ext.P5 was also

submitted.

3. The petitioners complain that even after elapse of months after the R.T.A.Malappuram granted approval to the proposed project, the respondents are not taking steps for execution of the agreement. Though the item was on the agenda of the Panchayat Committee meeting, the same was not taken up for consideration. The petitioners contend that in view of the earlier decision of the Committee it is not even necessary to place the matter before the Committee again. According to them, there is no impediment for execution of the agreement and for commencement of the work. Invitation of proposals and acceptance and all subsequent actions were taken in public interest. The decisions were taken considering the long felt need of the public for establishment of a new bus stand and the Panchayat is not going to incur any expenditure since the entire expenditure will be met by the petitioners themselves who after construction will hand over the building to the respondents.

4. On the above averments the petitioners raise several grounds and pray that a writ of mandamus be issued directing the respondents to execute necessary agreement and to permit the petitioners to commence construction work of the bus stand pursuant to decision No.1 (5) and (6) dated 10.3.2005 of the Panchayat.

5. On behalf of the Panchayat a counter affidavit has been filed through the 2nd respondent-Secretary. The facts relating to Exts.P1, P2 and the submission of successive requests by the petitioners for taking steps for execution of the agreement pursuant to Exts.P1 and P2 are not disputed. It is contended that the terms and conditions of the agreement to be executed and the decision for construction of the bus stand is to be taken by the Panchayat Committee and not by the Secretary, the 2nd respondent. It is for the Committee to approve the terms and conditions of the agreement to be executed and also to take a policy decision for implementing the scheme proposed by the petitioners for the construction of the bus stand. This was why the matter was placed before the Panchayat Committee meeting. On 1.1.2007 an emergent meeting of the Panchayat Committee was convened for discussing the matter. In that meeting out of 20 elected members of the Committee, 19 members participated. The 2nd respondent-Secretary also attended the meeting and recorded his views on the item in the agenda. Out of 19 members present, majority, i.e. 16 members resolved that corruption, malpractice, bribery etc. are involved from the very beginning of the proposal and therefore a vigilance enquiry has to be conducted and that till the vigilance enquiry is completed, the construction of the bus stand has

to be deferred. Three members endorsed their opinions favouring the proposal of the petitioners. Ext.R1(a) is copy of the resolution passed by the Panchayat in view of the opinion of majority of members. Ext.R1(a) records the objections of three dissenting members also. The 1st respondent-Panchayat can take decision only according to the majority of the decision of the members and the 2nd respondent is only an implementing officer who is to implement the decision of the 1st respondent. The counter affidavit goes on to deny the grounds raised in the Writ Petition and it is contended that the question of execution of agreement between the petitioners and the Panchayat will arise only after the Committee of the Panchayat accepts the petitioners proposal. The Committee decision was to request the Government to conduct a vigilance enquiry and to defer all action till the vigilance enquiry is completed. The 2nd respondent is not under the influence of anybody. If and when the Committee of the Panchayat decides to execute the agreement for construction of the new bus stand, the 2nd respondent will not have any difficulty in implementing that decision. The Writ Petition is not maintainable since the petitioners have approached this court without resorting to statutory remedies available under the provisions of the Kerala Panchayat Raj Act.

6. Mr.K.P.Abbas, a member of the Panchayat got himself impleaded as additional third respondent in the Writ Petition has filed a counter affidavit. The maintainability of the Writ Petition is seriously challenged in this counter affidavit. The petitioners do not have any legal right to enforce the execution of the agreement in their favour by the Panchayat. In the absence of a legal right and a corresponding legal duty, a writ of mandamus cannot be issued and under Article 226 of the Constitution this court is not expected to enforce non-statutory and non-concluded contracts which are to be remedied by civil action. The counter affidavit goes on to justify the decision taken by the Panchayat in its meeting on 1.1.2007. The decision was taken due to widespread corruption charges and huge amounts involved in issue. The Panchayat does not want the project to be abandoned. But since there is allegation of corruption, the Panchayat wants to enquire into those allegations so that the truth can be find out. The anxiety of the petitioners is unwarranted. The petitioners who had agreed to surrender 2.8 acres of land have already removed thousands of loads of soil from the area and sold it for huge amounts in the wake of bus stand construction. The fact that the petitioners started excavation work even before the agreements were executed is indicative of the large scale corruption involved in the matter. Sale

of 8 cents of land to one V.N.Jithesh belonging to Kodakara under document No.2738/05 and sale of two cents of land to one Yousaff belonging to Punnathala under document No.2851/05 and sale of another two cents of land to one Mohammed Sathar by means of document No.2852/05 are quoted as instances of corruption. It is alleged that the assignees under these documents were benamies of members of the Sub Committee which recommended the proposal submitted by the petitioners. It is contended that the circumstance that the petitioners have sold paltry extents when they are having more than seven acres indicates that the intention behind the deals was not holy. The counter affidavit refers to W.P.C.No.33996/06 which was filed by the petitioners seeking police protection for excavating soil. When the respondents in the above Writ Petition pointed out to this court that an agreement is yet to be signed between the petitioners and the Panchayat, this court through its judgment directed that police protection shall be given to the petitioners only if the Panchayat has signed the agreement with the petitioners for construction of the bus stand. Ext.R3 letter dated 8.9.2006 of the District Collector, Malappuram which was one of the documents produced by the writ petitioners before this court is produced along with the counter affidavit. It is contended with

reference to Ext.R3 that huge quantities of soil was excavated by the petitioners even before the agreement was signed and that even before the present Writ Petition seeking execution of the agreement is disposed of, the petitioners sought police protection for removal of the soil. The intention of the petitioners has been mainly to remove the soil irrespective of whether the bus stand becomes a reality.

7. Mr.K.Gopalakrishna Kurup, learned counsel for the petitioners, Smt.N.Sudha, learned counsel for the Panchayat and Mr.Babu Paul, learned counsel for the additional third respondent, a Panchayat member addressed me extensively.

8. My attention was drawn by Mr.Gopalakrishna Kurup to the pleadings and the various documents placed on record by the petitioners and also to Ext.R1(a). Mr.Kurup supplied me with a copy of the judgment of the Tribunal and submitted that the allegations of corruption on the basis of which the Panchayat now wants a vigilance enquiry to be held before it executes an agreement for implementation of a decision already taken were all considered by the Tribunal and thereafter by this court also. Though the political colour of the Panchayat Committee in power might have changed, the Panchayat remains the same and the decision taken by the previous committee is binding on the successor committee also. Mr.Kurup

referred to Sub-sections 6 and 7 of Section 161, Sub-section 3 of Section 182 and also to Section 191 of the Kerala Panchayat Raj Act during the course of his submissions. Learned counsel supplied me also with a copy of the common judgment in W.P.C.No.22971/05. Learned counsel relied on various judicial precedents including the judgments in **District Executive Officer v. State of Kerala** (1991 (1) KLT 390), **Gojer Brothers v. Ratan Lal** (AIR 1974 S.C. 1380), **ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.** [(2004) 3 S.C.C. 553)], **Grace Joseph v. State of Kerala** (ILR 2006(3) Kerala 198) and **Malayala Manorama Company Ltd. v. Asst. Commissioner**(KGST) (ILR 2006(3) Kerala 592).

9. Smt.N.Sudha while making submissions on the basis of the counter affidavit submitted on behalf of the Panchayat, referred to Ext.R1(a).

10. It was Mr.Babu Paul who resisted the submissions of Mr.Kurup with greater vehemence. Mr.Babu Paul submitted on the basis of the counter affidavit of the additional third respondent and referred to Ext.P8 order of the District Collector. A writ of mandamus in favour of the petitioners is out of question in the absence of a legal right in their favour and a corresponding legal duty on the Panchayat.

There is no concluded contract between the petitioners and the Panchayat and their grievance, if any, ought to be got redressed by the competent civil court and not by this court under Article 226 of the Constitution. The designs of the petitioners are not clean. They only want to excavate and sell earth from their extensive properties under the guise of constructing the bus stand. Even before contract was executed, they were able to remove excessive quantities of soil and earn lakhs, so submitted Mr.Babu Paul. Counsel referred to Sub-section 7 of Section 161 of the Panchayat Raj Act and relied on judgments in **State of Kerala v. G.Anirudhan** (ILR 2001(2) Kerala 113), **Kadamakudi Panchayat H.M.Co-op. Society v. Kadamakudi Grama Panchayat** (1996(2) KLT(Sh.Notes) 61 (case No.70) and **Binny Ltd. v. Sadasivan** [2005(4) KLT 315(SC)].

11. Mr.K.J.Mohammed Ansar, learned Government Pleader would refer to Section 191 of the Panchayat Raj Act and submit that under that section it is open to the petitioner to apply to the Government for cancellation of the resolution of the Panchayat. Now that the Panchayat has passed the resolution, the Government will be conducting the vigilance enquiry which is sought for by the Panchayat. But if the Government receives any application from the petitioners, the Government will be taking appropriate action having

due regard to sub-section 2 of Section 191 of the Panchayat Raj Act.

12. It is true that this court normally will not exercise jurisdiction under Article 226 of the Constitution to enforce non-statutory and non-concluded contracts and will only relegate the aggrieved party to appropriate civil action. It is also true that where an alternate remedy exists this court will be slow to invoke the discretionary jurisdiction under Article 226 even before the party has exhausted the alternate remedy provided under the statute. However, it is by now trite that that existence of alternate remedy is not a bar to writ jurisdiction. In all cases where facts are undisputed and when the question to be decided is purely legal, it is not necessary that the party be relegated to the alternate remedy as held by Division Benches of this court in **Grace Joseph v. State of Kerala** (supra) and **Malayala Manorama Company Ltd. v. Asst. Commissioner(KGST)** (supra). In fact the Supreme court has held in **ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.** (supra) that in an appropriate case this court has jurisdiction to entertain a Writ Petition involving disputed questions of fact and there is no absolute bar in regard thereto and that if the facts so require, even oral evidence can be taken in writ proceedings. The issue relating to the issuance of writ of mandamus

has been considered by the Supreme Court in **Binny Ltd. v. Sadasivan** (supra). The Supreme Court has held that a writ of mandamus lies even against a private body or person if such private body is discharging a public function, the decision sought to be corrected or enforced is in discharge thereof and public duty imposed is not of a discretionary character. Duty cast on the public body may be statutory or otherwise and the source of such powers is immaterial, but there must be public law element in such action.

13. The first respondent-Panchayat is pre-eminently a public institution being a democratic self government by virtue of the 73rd amendment of the Constitution of India. The Panchayat in exercise of its statutory functions invited proposal for the construction of a bus stand and proposals were submitted by various groups including the petitioners. The Committee of the Panchayat decided to accept the proposals submitted by the petitioners. That decision was challenged before the Tribunal for Local Self Government Institutions on various grounds including the ground that the Panchayat members or members of the concerned Standing Committee who took the decision to accept the proposal of the petitioners did so on account of extraneous considerations. The decision to accept the petitioners offer was challenged as being illegal, arbitrary, vitiated by vested

interest, favourtism and nepotism. The decision was challenged on all conceivable grounds before the Tribunal for Local Self Government Institutions. The Tribunal by its judgment dated 7th July, 2005 repelled all the contentions and the approved the decision to accept the offer submitted by the petitioners. In its well reasoned judgment the Tribunal has repelled all the grounds. In paragraph 18 of the judgment the Tribunal finds as follows:

"It is pertinent to be noted that 3 parties including the appellant in Appeal No.117/05 and respondent Nos.2 and 3 (M/s.A.J.Group and the present petitioners) submitted offers for surrender of fully built lup bus stand in response to the notification inviting proposal for suitable land for the establishment of bus stand and in that circumstance the allegation of the appellant in Appeal No.100/2005 (P.T.Abdu Rahman) that there was clandestine arrangement behind the notification inviting proposal for land for the establishment of a bus stand and the offer of respondents 2 and 3 for the free surrender of a fully built up bus stand in response to that lnotification has no factual foundation."

Later in paragraph 19 the Tribunal has found that the allegation of the appellant in Appeal No.100/05 that the Panchayat has submitted to private individuals by accepting the offer without prescribing any

guideline or specification for the bus stand has no factual foundation. Elsewhere in paragraph 21 of the judgment the Tribunal held as follows:

"The appellant in Appeal No.100/2005 has favoured the offer of the Appellant in Appeal No.117/2005 pointing out that his offer was more beneficial and convenient than that of the offer made by respondents 2 and 3 and in that circumstance the challenge posed by the appellant in Appeal No.100/2005 against the acceptance of the offer made by respondents 2 and 3 pointing out that it was perpetuated with the oblique motive of minting money by the sale of the adjacent property at exorbitant price will not stand even for a moment. Because of the offer of respondents 2 and 3 the Panchayat is getting fixed assets worth more than Rs.50,00,000/- and it may be true that by providing that much of assets to the Panchayat without any condition they are intending to reap benefits by dealing with their property adjacent to the site for bus stand."

Elsewhere in the same paragraph the Tribunal has held as follows:

"It may be true that the object behind the offer of respondents 2 and 3 is to secure exorbitant price for their property adjacent to the plot proposed for the bus stand and as the Panchayat or the residents of the Panchayat are not going to loose anything because of the hike

in the price of the adjacent property, the challenge posed against the decision accepting the offer of respondents 2 and 3 by pointing out that their offer is for getting exorbitant price for their property adjacent to the plot offered for the establishment of bus stand will not stand."

The Tribunal noticed that there was no dispute to the position that establishment of a new bus stand at Valancherry is an absolute necessity in view of the increase in the number of buses reaching that town and that in order to satisfy the requirement of a new bus stand the Panchayat invited proposals for suitable land and accepted the proposal submitted by the present petitioners by a majority decision and the Tribunal held that there is no warrant at all for interfering with the decision of the Panchayat to accept the offer of respondents 2 and 3, i.e. the present petitioners. The decision of the Panchayat in fact was confirmed by the statutory Tribunal and having regard to the principles laid down by the Supreme Court in **Gojer Brothers v. Ratan Lal** (supra) which has been followed by this court in **District Executive Officer v. State of Kerala** (supra), it has to be found that the decision of the Panchayat has become emerged with that of the Trilbunal and the order in operation is that of the Tribunal. It is therefore doubtful whether the Panchayat could have taken the

impugned decision not to implement the earlier decision till such time as a vigilance enquiry is held and the result obtained since the Panchayat's decision amounts to suspending the order of the Tribunal, the appellate authority.

13. On the merits also in view of the categoric findings entered by the Tribunal through its order and the endorsement of the Tribunal's views by this court in its common judgment in W.P.C.Nos.22971/05 and 23098/05 except the extent of insisting that a decision shall not be implemented before the Regional Transport Authority grants approval to the proposal to establish the bus stand on the property offered by the petitioners, it will be difficult to support the present stand of the Panchayat that the earlier decision of the Panchayat is vitiated by corruption. The three documents placed on record by respondents 2 and 3, according to me, by themselves will not show that those documents have been executed in favour of the benamies of the former committee members as illegal gratification for the favour that they did to the petitioners. Sale of small bits of land, with commercial potentiality in view of proximity to an upcoming bus stand is not an unknown phenomenon.

14. It cannot be disputed by anybody that the land which has been offered by the petitioners for construction of the bus stand is

not suitable for establishment of the bus stand. In fact on the request of the Panchayat the competent authority has granted approval for establishing the bus stand on that land. The bus stand building to be constructed by the petitioners shall be in accordance with the specifications of the Panchayat only. It is a common ground that the establishment of a new bus stand is a direly felt need of the Panchayat. The proposal to have a vigilance enquiry into the corruption which allegedly taints the decision of the Panchayat to accept the petitioners' offer need not stand in the way of establishment of the bus stand. It is not anybody's case that any loss has been occasioned to the Panchayat on account of the acceptance of the petitioners proposal. In fact since the land is being given free of cost and the entire construction is being undertaken by the petitioners freely, possibilities of any pecuniary loss being sustained by the Panchayat is remote. In fact the allegation all along and now is only that the petitioners stand to gain considerably due to the appreciation of the value of their remainder lands on account of emergence of the bus stand. Therefore I am of the considered view that the proposal to have a vigilance enquiry into the so-called corruption which taints the decision to accept the petitioners' proposal shall not stand in the way of the bus stand being established

at the earliest. Even the additional respondent, obviously one of the most enthusiastic votaries of vigilance enquiry call does not contend that the Panchayat does not need the bus stand. I do not propose to interfere with the resolution of the Panchayat to request the Government to conduct a vigilance enquiry. The additional 4th respondent will do the needful to have the enquiry sought for the Panchayat conducted at the earliest and will ensure that a report of the enquiry is received within six months of receiving copy of this judgment. The petitioners are directed to file an affidavit before the Secretary of the Panchayat in which they will undertake that in the event of it being clearly and finally found in that the decision of the Panchayat to accept the proposal of the petitioners to establish the bus stand is vitiated by corruption, and if the Panchayat takes a decision to shift the bus stand to elsewhere, they shall not raise any objections in the matter. They will also state therein that under such a contingency they will not raise claims over the building constructed by them for the purpose of the bus stand and that they will not have any objection to the Panchayat utilising the said building for any other public purpose of its choice. Once an affidavit in the above form is filed by the petitioners, the Panchayat will do the needful to have the necessary agreements executed incorporating the terms of the

affidavit also therein so as to have the bus stand established on the property surrendered to be by the petitioners at the earliest.

The Writ Petition is allowed to the above extent. No costs.

srd **PIUS C.KURIAKOSE, JUDGE**